In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 546

J. M. EASTLAND AND MONTEZ EASTLAND, PETITIONERS

v.

ELLIS CAMPBELL, JR., DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

1. Section 3500[1] of the Criminal Code (18 U.S.C. 3500) prohibits the discovery, in any criminal prosecution brought by the United States, of any statement or report in the possession of the United States which was made by a government witness or prospective witness, until the witness has testified on direct examination in the trial of the case. Rule 34 of the Federal Rules of Civil Procedure[2] provides for the discovery

[1] As added by the Act of September 2, 1957 (the "Jencks Act"), P.L. 85-269, 71 Stat. 595. See *Jencks* v. *United States*, 353 U.S. 657.

[2] Unless otherwise indicated, references hereinafter to specific rules will be to the Federal Rules of Civil Procedure.

and production, on a showing of "good cause," of matters which are "not privileged." The Fifth Circuit has, in this case, rendered an extremely narrow decision accommodating the purposes of these differing provisions in one particular set of circumstances. It has held in this civil action for a refund of taxes that there was no "good cause" for refusing to delay discovery of reports made by potential witnesses for the government in a prospective criminal prosecution where (1) the prosecution of the taxpayer was imminent and indeed was not pending only because of the entreaties of the taxpayer; (2) there was reason to believe that the taxpayer has sought discovery primarily in order to use civil discovery procedures to subvert the restrictions on criminal discovery; (3) the civil suit was far from being due for trial and there was no showing of any need for immediate discovery; (4) the taxpayer's suit obviously depended upon facts within his own knowledge and he was seeking only to discover the defenses available to the government; (5) "limited discovery by interrogatories and other remedies were available to the taxpayer"; and (6) "the record [was] bare of any showing that a reasonable delay would have prejudiced the taxpayer in the civil suit" (Pet. 57–58).

It is, we believe, fair to say that the only broad issue presented by the decision below is whether the government's statutory privilege against discovery in an imminent criminal prosecution must be completely ignored in passing on a motion for a delay in discovery in a related civil suit. That issue was correctly decided. Moreover, even if there were room for

serious doubt as to the correctness of the court's carefully restricted holding, the decision below would have to be affirmed, for the court below also correctly held that the district court's remedial order granting judgment for the taxpayer without a "shred of affirmative evidence in the record to support a recovery by the plaintiffs" (Pet. 61) exceeded the trial judge's discretion in the circumstances of this case. In order to best serve "the ends of justice" (Pet. 63), the court of appeals remanded petitioner's tax-refund suit for full trial on the merits. The court observed that petitioner would be free to file a new motion for discovery and that (petitioner having by then been convicted on his plea of guilty in the criminal case) such a motion would no longer be hampered by a parallel criminal proceeding (Pet. 63).

2. The petitioner asserts that there is a conflict between the decision below and the decision of the Sixth Circuit affirming the Tax Court, in *Commissioner* v. *Licavoli*, 252 F. 2d 268. In *Licavoli*, the question was whether the Tax Court had correctly applied its Rule 17(c), authorizing the striking of a pleading which does not comply with the Tax Court's Rules of Practice. The Commissioner had asserted a deficiency which would have been barred by limitations unless he sustained the allegations of fraud contained in his answer. The answers was found to be insufficiently detailed (Tax Court Rule 14(b)) and, after the Commissioner persisted in failing to amend his answer to comply with the rules, the defective portion of the answer was stricken. Since this eliminated the fraud allegations, the bar of limitations applied and the proposed deficiency failed.

The decision below is sharply distinguishable from *Licavoli* in a number of respects:

(a) *Licavoli* did not involve the right of the government to a delay in providing access to information, but the right to refuse it entirely.

(b) The present case, unlike *Licavoli*, resulted from the taxpayer's own initiative. It was not triggered by any deficiency assessment (as in *Licavoli*) nor complicated by any government counterclaim. Here, as Judge Wisdom observed (Pet. 57), "[t]here could be no question of surprise as to the facts, because the taxpayer's right to a refund depended on financial records in his possession and facts within his knowledge. The taxpayer could be surprised only by a contention the Government might make based on the Agents' legal interpretation of the facts." And even that possibility might have been eliminated (unlike the situation in *Licavoli* which involved very different rules)[2] through more limited discovery instruments which would not have run directly counter to the policy against pre-trial disclosure of confidential reports in criminal cases (Pet. 24).

(c) In *Licavoli*, the taxpayer sought information as to a year which was not directly involved in any pending or proposed criminal prosecution. The prosecution in *Licavoli* covered 1950 and 1951. The Tax Court proceeding related to 1947.

(d) The *Licavoli* opinion does not consider the interrelation of the Jencks Act with either the Tax

[2] *Licavoli* turned on the special rules formulated by the Tax Court (under authority of Section 7453 of the Internal Revenue Code of 1954) to govern its own practice.

Court Rules or the Federal Rules of Civil Procedure, doubtless because the case was briefed and argued before enactment of that statute. This is an important intervening factor which, even without the previously stated distinctions, would render any apparent conflict meaningless.

3. In attempting to convince this Court that it should undertake review of the court of appeals' conclusion that no good cause existed in this case for immediate discovery under Rule 34, the petition creates the impression that the court of appeals would have reached a different conclusion had it been fully informed as to the contents of the file which the government sought to protect. It is suggested that the file included a portion of the Revenue Agent's report which was intended to be, and later was, given to the taxpayer in connection with the civil case, and which contained no mention of the criminal case; that it was incumbent upon the government to explain to the courts below that this document was a part of the file; that the district court, had it been thus advised, would have limited its production order to this document; and that the court of appeals would have sustained such an order.

This line of argument totally misconceives the government's position and the court of appeals' holding. The portion of the Revenue Agent's report which was eventually made available to petitioner was, as much as any other document in the file, a report dealing with matters which might well be issues in the contemplated criminal case. It was also the work-product of a government agent who was a prospective

witness in the criminal case. The purposes of the Jencks Act applied as fully to the Revenue Agent's report as to the rest of the file and this report would have been immune to discovery in a criminal proceeding. The fact that the report did not deal explicity with the criminal case as such does not affect its status under the Jencks Act. Nor does the fact that it was prepared with the end in view of giving it to the taxpayer (in accordance with established practice) *after* the final disposition of the criminal case.[1] In short, the Revenue Agent's report was not distinguishable from the rest of the file in any relevant respect.

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[1] It is implicit in the nature of income tax crimes that the preparation for criminal prosecution will be intertwined with the determination of the civil tax liability. This requires the establishment of an administrative order of priority as between the criminal and civil tax aspects of the case. Long-continued administrative practice and experience have resolved the question of priority in favor of first disposing of the criminal aspects of the case before proceeding with formal determination of the civil tax liability. Therefore, although the portion of the Revenue Agent's report which may ultimately go to the taxpayer may already have been prepared (see Pet. 15–17), it will not ordinarily be supplied to the taxpayer until after the criminal aspects of the case have been closed. In the present case, after the taxpayer had been convicted and sentenced in mid-September, 1961, the way was cleared for administrative action on the civil tax liability. The administrative file shows that on October 25, 1961, after prior informal communications, the petitioner requested through his counsel that he be supplied with a "30-day letter." Internal processing and final review took about a month. There is no basis for the innuendo (Pet. 16–17) that the mailing of the "30-day letter" was timed to coincide with the date the case was to be argued in the Fifth Circuit.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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